

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment?
- (2) What is the nature and extent of claimant's injury and disability?
- (3) Is claimant entitled to future medical and/or unauthorized medical treatment for the injuries alleged?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant is an MRT-II at Kansas Neurological Institute in Topeka, Kansas. He is directly involved in the care of mentally handicapped, overly aggressive patients. On November 19, 1992, claimant, while pursuing a KNI client who was attempting to escape, slipped and fell outside of one of the KNI buildings. The respondent argued long and hard regarding claimant's description of the accident. The respondent asserted claimant was incapable of providing an accurate description regarding when and where this slip and fall occurred and what portion of his body was injured at the time of the slip and fall. The testimony of the claimant regarding the circumstances surrounding the incident and the area of his body which was hurt was totally uncontradicted by the respondent. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive. Anderson v. Kinsley Sand & Gravel Inc., 221 Kan. 191, 558 P.2d 146 (1976). The respondent's bare allegations, absent the slightest scintilla of evidence supporting the same, are simply not sufficient to justify this Appeals Board finding claimant's testimony to be untrustworthy. The Appeals Board finds the claimant did suffer personal injury by accident arising out of and in the course of his employment as alleged on November 19, 1992.

Claimant has returned to work for the respondent at the same job earning a comparable wage. K.S.A. 1992 Supp. 44-510e(a) provides:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

There is no evidence in the record to justify work disability for the claimant and as such he would be entitled, at most, to only a functional impairment. With regard to functional impairments, "the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of Proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden must be established by claimant by a preponderance of credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Claimant attempted to obtain medical treatment at a preliminary hearing on April 5, 1993. At that hearing claimant exhibited physical difficulties which caused him to limp significantly. Claimant testified that he had ongoing problems physically, even to the point that it caused him difficulty to put weight on his right leg. This testimony of claimant was substantially contradicted by a video tape placed into evidence by the respondent after claimant's testimony. In the video tape, claimant is shown not only moving without a limp but exhibiting a good deal of physical ability in dunking basketballs, leaping off circular trampolines, lifting his children up to the level of the basket, and chasing the basketball around his backyard. This video tape lasted for nearly an hour during which time claimant exhibited no physical limitations and at no time displayed a limp. The video tape raised significant questions regarding claimant's credibility.

The claimant, in alleging significant functional impairment in this matter, relied exclusively on the testimony of Dr. Nathan Shechter, a board-certified orthopedic surgeon. Dr. Shechter assessed claimant a seven and one-half percent (7.5%) permanent partial impairment to the body as a whole, basing his finding almost exclusively on the diagnosis of a snapping hip found during his examination of claimant. On cross examination, Dr. Shechter was asked to verify whether he used any learned medical treatises in reaching this opinion. He made reference to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, and also to the Orthopedic Guides to the Evaluation of Permanent Impairment, along with his fifty years of experience as a medical doctor. When asked specific questions regarding the page and chart numbers in the AMA Guides used in reaching this impairment, Dr. Shechter was unable at any time to produce any indications of how he arrived at the seven and one-half percent (7.5%) impairment rating. He was further asked to produce a copy of the Orthopedic Guides for purpose of cross examination. Dr. Shechter refused the request by the attorney for the Fund and continued to so refuse throughout the remainder of the deposition. The credibility of Dr. Shechter's opinions were called into question by this attitude during cross examination.

The respondent provided the testimony of Dr. Joseph Sankoorikal, a physiatrist in Topeka, Kansas, to support its case. Dr. Sankoorikal, in evaluating claimant, found claimant had suffered no permanent impairment as a result of the injury of November 19, 1992. Dr. Sankoorikal's physical examination of claimant, like that of Dr. Shechter's, found claimant to have no limitations of motion with the only finding from Dr. Sankoorikal being slight tenderness in claimant's hip. He found no justification for providing an impairment rating using the AMA Guides, and was able to specifically pinpoint the pages from the AMA Guides used when evaluating claimant. He further indicated that claimant walked without

a limp, a finding consistent with Dr. Shechter, adding further support to his zero percent (0%) impairment rating. He found no motor strength deficits, no radicular pain, and no sensory deficits during the examination.

As the trier of facts the Board must decide which testimony is more probable and credible as it relates to the question of the disability. The Appeals Board finds the testimony of Dr. Sankoorikal to be more persuasive than that of Dr. Shechter. The Appeals Board further finds the testimony of the claimant at the Preliminary Hearing to lack credibility. In light of the video tape evidence the Appeals Board finds, based upon the review of the entire file, that claimant has suffered no permanent impairment as a result of the injury suffered November 19, 1992.

The Appeals Board further finds no justification for granting claimant future medical as there is no indication from Dr. Sankoorikal that claimant would be in need of additional medical care from this incident.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of the Special Administrative Law Judge William F. Morrissey is modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Gary M. Burkdoll, is hereby granted an Award against the respondent, Kansas Neurological Institute and the State of Kansas Self Insurance Fund, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on November 19, 1992, based on an average weekly wage of \$391.62 for 20.43 weeks of temporary total disability compensation at the rate of \$261.09 per week in the sum of \$5,334.07. Additional compensation to the claimant is herein denied.

As of the date of this Award the entire 20.43 weeks of temporary disability compensation at the rate of \$261.09 per week in the sum of \$5,334.07 would be due and owing in one lump sum, less any amounts previously paid.

Unauthorized medical expenses of up to \$350.00 are ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

All costs, including temporary total disability compensation, medical expenses and costs, are to be borne 50% by the respondent and 50% by the Kansas Workers Compensation Fund.

Claimant's contract for attorney fees is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed fifty percent (50%) against the respondent and its insurance carrier and fifty percent (50%) against the Kansas Workers Compensation Fund to be paid as follows:

William F. Morrissey  
Special Administrative Law Judge

\$150.00

Nora Lyon & Associates Transcript of Preliminary Hearing	\$299.00
---	----------

Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Regular Hearing	\$213.20
Deposition of Joseph G. Sankoorikal, M.D.	\$145.20

Hostetler & Associates Deposition of Nathan Shechter, M.D.	\$217.90
---	----------

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 1995.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

cc: Larry T. Hughes, Attorney at Law, Topeka, KS  
Billy E. Newman, Attorney at Law, Topeka, KS  
Darin M. Conklin, Attorney at Law, Topeka, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director